No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 589

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 264-267) is reported at 208 F. 2d 842.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 268), and a petition for rehearing was denied on December 14, 1953 (R. 303-304). On January 13, 1954, Mr. Chief Justice Warren entered an order extending the time for filing a petition for a writ of certiorari to

and including February 12, 1954 (R. 307), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the fact that the trial judge reproved an attorney, at times in stern language, prevents the trial judge from summarily punishing the attorney for contempt.

STATUTE AND RULE INVOLVED

18 U.S.C. 401 provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure provides:

> (a) Summary Disposition.
>
> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall

recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioner was convicted, in the United States District Court for the District of Columbia, of contempt of court, in violation of 18 U.S.C. 401(1), based on his alleged misconduct in the presence of the court in the course of acting as attorney for the defendant during the trial of the case of *United States* v. *Henry L. Peckham* (R. 25-29). The con-

viction, as to four of the trial court's 12 specifications of contempt, was affirmed by the Court of Appeals, but that court reduced the sentence from 10 days to 48 hours because of its view that the petitioner's conduct was inseparable from that of the trial judge (R. 266-267, 268).[1]

The order and specifications of contempt insofar as they were sustained by the Court of Appeals are as follows:

> Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that I saw and heard the contempts of court hereinafter described, and that they were committed by Dorsey K. Offutt in the actual presence of the court during the trial of a criminal proceeding before me entitled *United States* v. *Henry L. Peckham, Jr.*, commencing May 27, 1952, and ending this day. Said Offutt was counsel for the defendant in that case.
>
> I find that said Offutt was guilty of the following breaches of decorum and offensive, contumacious, and unethical conduct in open court during the trial; and that said breaches and course of conduct constitute contempt of

[1] The Court of Appeals stated:

"• • • Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The judge's treatment of appellant, examples of which are included in an appendix to our opinion in *Peckham* v. *United States*, decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours. • • •"

The *Peckham* opinion appears at pp. 269-290 of the present record. See especially pp. 281-290.

court. The transcript of proceedings at the trial is hereby made a part hereof by reference. The citations herein * * * are intended to be illustrative and not exhaustive.

1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.

* * * * *

2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness. * * *

* * * * *

6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "*When* were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case. [R. 50-52.] * * *

* * * * *

12. He constantly tried to create an episode that might lead the court to direct a mistrial.

Wherefore, it is * * * Ordered, Adjudged, and Decreed, that said Dorsey K. Offutt is

guilty of criminal contempt of court as aforesaid, and that he be committed to the custody of the United States Marshal for the District of Columbia, for a period of 10 days.

(S.) ALEXANDER HOLTZOFF,
United States District Judge [R. 25-29.]

As exemplary of the first specification of contempt, the trial court made a number of references to the record (R. 26). These included the following:

(1) June 4, 1952 (R. 78-79).

At the petitioner's direction, a subpoena had been served upon Mrs. Hodges, mother of the complaining witness, in Erie, Pennsylvania, requiring her presence in the District of Columbia for the purpose of testifying as a defense witness (R. 24-25). In response to the subpoena, she arrived in the District on June 1, 1952 (R. 79). On June 4, the trial court was informed that Mrs. Hodges, as the result of her forced absence from her home and six children, was in financial difficulties (R. 75). At the suggestion of the prosecuting attorney, the petitioner requested leave to call the witness out of turn (the Government had not at this time concluded its case) (R. 76). The request was granted and Mrs. Hodges took the witness stand. After answering several preliminary questions, she was asked to state the number of years the complaining witness had lived away from Erie. The prosecuting attorney's objection to the question was sustained (R. 78.) She was then asked if she was before the

court in response to a subpoena. The court of its own motion excluded the question as immaterial. The following colloquy then occurred:

> Mr. Offutt: If your Honor please, if I am going to have interruptions like this, I don't want to examine the witness at all. I want to examine this witness and I want to have free opportunity to present what I have.
>
> The Court: Now, you are getting insolent.
>
> Mr. Offutt: I don't mean it insolently.
>
> The Court: You will have to conduct your examination within the framework of the rules of evidence as the Court construes them. Now, proceed.
>
> Mr. Offutt: Well, I will have to wait until I present my case.
>
> The Court: You may proceed now.
>
> Mr. Offutt: Are you ordering me to proceed? I would rather wait now until my case is over.
>
> The Court: I direct you to proceed.
>
> Mr. Offutt: May I object to being ordered to proceed at this time? [R. 79.]

(2) June 4, 1952 (R. 81-82).

During the course of his examination of Mrs. Hodges, the petitioner asked the witness when she had first discussed the Peckham case with him. Before a response was made, the court announced that it would not permit the disclosure of any conversation between the witness and the petitioner. The petitioner withdrew the question (R. 79). Shortly thereafter, however, he posed substantially

the same question, but in a somewhat different form. An objection was immediately interposed by the prosecutor and sustained by the court. The petitioner then stated in open court:

> If Your Honor please, I object to Your Honor raising your hand and leaning forward and looking at the District Attorney before he makes an objection [R. 81].

The petitioner was immediately called to the bench and told that if he persisted in such conduct he would be sent to jail at the close of the trial (R. 81).

(3) June 6, 1952 (R. 161-162).

The Government's first witness in the Peckham case was Mrs. Ott. After having concluded her testimony, she remained in the courtroom as a spectator. When her mother, Mrs. Hodges, was subsequently called as a defense witness, petitioner requested that Mrs. Ott be excluded from the courtroom. The court denied the request, explaining that it was the uniform practice of the District Court, that witnesses who had testified were permitted to observe the remainder of the proceeding. Despite the explanation, the petitioner renewed his objection to the presence of Mrs. Ott and the following discussion occurred:

> The Court: After her testimony is concluded, she can sit any place she likes. Any witness who has testified may remain in the courtroom as a spectator, and the mere fact the witness may be called for rebuttal is no reason for the Court not permitting the witness

to remain. We were over that yesterday, Mr. Offutt. Please don't repeat it.

Mr. Offutt: I object to the long speeches about it, your Honor; I just made an objection and I asked your Honor to rule on it, that's all.

The Court: You object to what?

Mr. Offutt: I object to——

The Court: You object to what?

Mr. Offutt: I object to the long dissertation about it. I made no argument; your Honor has not permitted me to make any argument, and I merely object to Mr. McLaughlin——

The Court: I think you are getting very discourteous to the Court.

Mr. McLaughlin: May I say for the record, your Honor, in view of your Honor's ruling the other day in regard to the witness, that Mr. Offutt's attitude of raising the question at this time is just to attract the attention of the jury to Mrs. Ott; that's all. It is just for an ulterior motive. [R. 161-162.]

(4) June 10, 1952 (R. 216-217).

William Jones, one of the several men with whom the complainant had apparently lived during the pertinent period of time, was called as a defense witness. The petitioner asked this witness various questions concerning the private life of Mrs. Ott (R. 181-184, 213). When, in pursuance of this objective, his manner toward the witness became menacing (R. 216), the petitioner was directed to desist. Rather than acquiescing in the court's order, he replied, "If Your Honor please, I object

to Your Honor interrupting me like this; it diverts my attention." (R. 216.)

The trial court included the following incidents as illustrative of the second specification of contempt, that the petitioner on numerous occasions persisted in repeating questions previously excluded by the court, in spite of the court's admonitions, after repeating those questions for the sole purpose, apparently, of besmirching the witness:

(1) June 3, 1952 (R. 54-55).

According to the testimony of Mrs. Ott, one George Christenson had accompanied her to the offices of the defendant, Peckham, at the time of the alleged May, 1951, abortion, and had subsequently assisted her when the fetus was passed. On cross-examination, petitioner asked Mrs. Ott what Christenson had said when informed that she intended to communicate with Peckham relative to the abortion. At this point, the court stated squarely: "Just a moment, I am going to exclude what George Christenson said." Nonetheless, the petitioner then asked Mrs. Ott: "Had George told you that he objected to it [the abortion]?" Again, the trial court stated that it would not permit any statement of Christenson to be admitted through the testimony of Mrs. Ott. But petitioner persisted, asking:

> Q. You said that George objected to it. When did he object to it? Give us the date. [R. 55.]

(2) June 5, 1952 (R. 131-132).

The petitioner asked the witness Kilpatrick on cross-examination if a Dr. Paul Bender had at any time attended Mrs. Ott during her confinement in Mt. Alto Hospital as a result of her second abortion, of January 18, 1952. The court interjected, stating "you may not cross-examine this witness about what some other doctor did," in view of the fact that the questions exceeded the scope of direct examination. Petitioner, nonetheless, continued:

> Q. Tell us the names of all the doctors who had anything to do with the treatment of this patient while she was in the hospital?
>
> The Court: I shall exclude that question.
>
> Mr. Offutt: May I finish my question?
>
> The Court: I think you did.
>
> Mr. Offutt: No, Your Honor, I didn't; I am sorry.
>
> The Court: Very well; you may finish your question.
>
> Q. Continuing the question—from the date of her admission, January 18, 1952, until the discharge, February 17, 1952?
>
> Mr. McLaughlin: I object to that, Your Honor.
>
> The Court: This question is excluded as beyond the scope of the direct examination.
>
> Q. Who saw the patient besides Dr. Burke, if any one you know of, before?
>
> The Court: I have excluded that whole line of examination. Don't ask any more questions along that line.

Mr. Offutt: May I know what line you are talking about so I won't transgress it. [R. 131-132.]

(3) June 5, 1952 (R. 151-152).

During the cross-examination of Christenson, the following colloquy occurred:

Q. As a matter of fact, you did not try to convince her to have the baby at all; isn't that right?

A. No, that is not true. I tried it all the time.

Q. Didn't you know that once before, from what she had—didn't she tell you that once before she was to have a baby and she tried her best to stop from having a baby?

A. No.

Mr. McLaughlin: I object, your Honor. There is no such testimony.

The Court: Objection sustained.

Mr. McLaughlin: And I think my friend should be reprimanded.

I object, your Honor.

The Court: Objection sustained, while on cross-examination. Mr. Offutt, I remind you of the fact that I have excluded that matter two or three times during this trial, and I don't want you to try to inject it again. [R. 151-152.]

No fuller reference to the contempts set out in specifications 6 and 12, *supra*, was made than was indicated by the terms of the specifications.

ARGUMENT

The petitioner's principal contention is that the trial judge was without power to adjudicate him

in contempt because the record shows that the judge had himself provoked some of the petitioner's misconduct and thus shown himself to be biased. Relying both on Rule 42 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution, he urges that a biased judge is disqualified to make a summary adjudication of contempt in the absence of some pressing necessity to keep a trial in process.

We reject first the factual premise of this argument. We do not concede that any of petitioner's contempts was provoked by the court, for we think that a fair reading of the record shows that petitioner deliberately set out to provoke the court, and would have continued to do so quite without regard as to what the court itself did. Nor do we concede that the trial court's reproofs to petitioner, though at times abrupt, reveal a bias that made it incapable of fairly and dispassionately adjudicating whether petitioner was guilty of contempt.

But even if it be conceded, as the Court of Appeals states, that the petitioner's "conduct cannot fairly be considered apart from that of the trial judge," each having "responded to great provocation from the other," still, there is no basis for disturbing the judgment below. For this Court's recent decision in *Sacher* v. *United States*, 343 U.S. 1, is dispositive of the issue thus presented. That case holds first that a district judge may postpone to the end of the trial the imposition of summary punishment on lawyers whose contempts have pervaded the trial. It also holds that the fact that the

INDEX

CITATIONS

Cases:

Statute and Rule:

contempt is personal to the judge does not deprive him of this power. The language of the Court on this issue is explicit (343 U.S. at pp. 11-12):

> A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of a judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. *It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]

Sacher, in short, explicitly recognizes the principle which is decisive here: the mere fact that the trial judge has become perturbed by the conduct of at-

torneys does not deprive him of the power to judge them guilty of contempt; at least, it does not do so in the absence of conduct of the judge which shows, more clearly, that he has cast aside his judicial responsibilities than is true either of *Sacher* or the present case.

It is true that in *Sacher*, the main case (*United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494) was not reversed on the basis of the judge's alleged misconduct, whereas it was in the present case. This apparently leads petitioner to the conclusion that there must be a reversal as well of the judgment of contempt against the attorney. But there is a difference between saying, on the one hand, that asperity by the court toward defense counsel may have led the jury to decide the case against the defendant, see *Whitaker* v. *McLean*, 118 F. 2d 596 (C.A. D.C.), and on the other hand, that the judge's treatment of defense counsel was such as to make unlikely the kind of detached judgment which should precede the punishment even of contemning lawyers. In any event, a comparison of the *Sacher* record with that of the present case reveals that the conduct of the trial court below was quite as restrained, even in the face of apparently deliberate provocation, as that of the trial court in *Sacher*.[2]

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[2] The petitioner's additional suggestion, which he does not seriously press, that he was entitled to a jury trial was also rejected by this Court in the *Sacher* case.

CONCLUSION

There is no significant legal question presented by this case which was not disposed of in the *Sacher* case. There is hardly a significant variation on the facts. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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MARCH, 1954.

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